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In the Supreme Court of the United States

OCTOBER TERM, 1970

GEORGE NASSER, ROBERT DAVID and ORLAND DAVID,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN POWERS CROWLEY
105 West Adams Street
Chicago, Illinois 60603
Attorney for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60610 (312) 922-0931

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In the
Supreme Court of the United States

October Term, 1970

No.

GEORGE NASSE, ROBERT DAVID and ORLAND DAVID,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, George Nasse, Robert David and Orland David, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix to this Petition (Appendix A.).

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1970, (Appendix B). A timely Petition for Rehearing was denied on November 2, 1970 (Appendix C and D). The jurisdiction of this Court was invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Does the inference of knowledge of the stolen character of property allowed to be drawn from recent possession violate due process?

2. When a conviction is based solely upon the inference drawn from recent possession of stolen property may it be said that a violation of the principles of Bruton v. United States constitutes harmless error?

3. When a conviction is based solely upon the inference drawn from recent possession of stolen property may it be said that a violation of the principles of *Miranda* v. *Arizona*, 384 U.S. 436 and *Griffin* v. *California*, 380 U.S. 609 constitute harmless error?

4. When there is no evidence connecting various portions of an alleged conspiracy except inference based upon inference may a conviction for conspiracy stand in violation of the principles of *Kotteakos* v. *United States*?

NATURE OF THE CASE

This action was commenced by the filing of an indictment containing thirty counts and charging thirteen defendants. Count I charged all defendants with the conspiracy to violate 18 U.S.C. §2312, 2313 and 2314 in violation of 18 U.S.C. §371 (App. 20-36). Motions for severance were filed by the defendants (App. 40-41, 45-48), and denied.

The petitioner George Nasse was found guilty as charged in Count I. The petitioners, Robert David and Orland David, were found guilty on Counts 1 and 8-16 and not guilty on Counts 2-7. (App. 11-13).

STATEMENT OF FACTS

The evidence, viewed in a light most favorable to the Government, established that cars were stolen and later appeared in various parts of the United States. In order to present a logical, chronological statement, we have separated the various autos and groups of autos.

NASSE CARS (COUNTS 2-7)

It was stipulated that the cars described in these counts were stolen between April 13, 1962 and September 11, 1962. It was further stipulated that these cars were titled in the State of Ohio by George Nasse within two to eleven days after the theft.

Nasse, an automobile dealer in Youngstown, Ohio, had purchased these cars from an individual that he knew as Stan. He had met him at an auto auction in 1961 in Akron, Ohio when Stan told him that he was a wholesaler for dealers and that he had Cadillacs to sell. On several other trips to Akron, Nasse again met him, although he did not buy any cars from him. Subsequently, in March of 1962, Stan appeared at David's Auto Sales, Nasse's place of business in Youngstown, Ohio, with a Cadillac automobile to sell. Nasse agreed to purchase the car, and he received either an Illinois or Indiana title. When he purchased the first car, he made out a check to the individual named on the title; Stan endorsed the check. Nasse then took the check to the bank, cashed it and gave the proceeds to Stan. On subsequent purchases, Nasse would make out checks to cash, cash them and give Stan the proceeds, or he would borrow the money for the purchase. (App. 99-103, 228).

Nasse obtained Ohio titles on the cars described in Counts 2, 3 and 4 by presenting Illinois certificates of title, and on the cars described in Counts 5, 6 and 7, by presenting Indiana certificates of title. (App. 58-64) The cars described in Counts 2, 3, 4, 5 and 6 were subsequently sold by George Nasse at the Manheim Auto Auction in Manheim, Pennsylvania after they had been cleaned up and minor repairs made by Nasse. Nasse and his employee Geidans were known at the auction. (App. 91-92). When dealers brought cars to the auction, they were inspected by a Pennsylvania State Trooper (App. 92). Nasse had registered at the auction under his true business name and was assigned a dealer tag number (App. 93). When he sold the cars at auction, he would make a profit of $50.00 to $150.00 (App. 104).

On September 27, 1962, the petitioners, George Nasse, Peter Nasse and Rudy Geidans were arrested at the Capitol Auto Auction in Columbus, Ohio in possession of the auto described in Count 7.

SCARCELLI CARS (Counts 8-12)

It is stipulated that the cars described in these counts were stolen between September 16, 1962 and December 20, 1962.

Frank Scarcelli, a convicted felon and an automobile dealer, testified that he met Robert and Orland (Joe) David in the late part of 1962. At that time the Davids asked him if he would be interested in wholesaling automobiles for them. Subsequently, Scarcelli obtained two Cadillacs (Counts 8 and 9) and wholesaled them to M. B. Thomas Auto Sales in St. Louis, Missouri. After the sale to Thomas, Thomas called Scarcelli and told him that there were liens on the cars. Scarcelli returned the money to Thomas and took these two cars to California where he

sold them to Lee Guggisberg, a used car dealer employed by B & G Motors in California (App. 106, 119). Guggisberg paid Scarcelli for these cars by making checks payable to Scarcelli, even though Scarcelli's name did not appear on the titles, cashing the checks and giving Scarcelli the proceeds. Guggisberg testified that the titles he received from Scarcelli appeared in all respects to be valid Illinois titles. He further stated that he perjured himself on the application for California title by stating that the automobile had come into California on his dealer plates. (App. 107).

Scarcelli sold the automobile described in Count 10 in California, which he had received from Robert and Orland David, to Vernon Napolitano, a private individual, for $4,500.00 in cash. Napolitano made no inquiry concerning the source of the automobile or verified the owner of the automobile prior to purchasing it from Scarcelli (App. 112, 113, 120).

Scarcelli sold the cars described in Counts 11 and 12 to Ralph J. Wilson, an automobile dealer in Garden Grove, California. Wilson paid Scarcelli in cash for the automobiles (App. 109) and testified on cross-examination that it was common practice in the automobile business to purchase cars from wholesalers with cash, and the fact that a different name appeared on the title gave him no hesitation whatsoever, as that happened consistently in the automobile business. (App. 111).

LASKY CARS (Counts 13-16)

It is stipulated that these cars were stolen between September 3, 1963 and November 29, 1963 (App. 67-69). Willard Lasky testified that he obtained the cars described in these counts from Robert and Orland David and they furnished to him Illinois titles, which even though Lasky

knew they were not genuine, appeared to be perfect Illinois titles. (App. 129). Lasky enlisted the services of Bennett Bush, Angelo Chiomis and George Tiger to sell these cars. They were subsequently sold or attempted to be sold to automobile dealers in Cincinnati, Ohio, Pittsburgh, Pennsylvania and St. Louis, Missouri.

ABRAHAM-WRIGHT CAR (Count 17)

It was stipulated that the car described in this count of the indictment was stolen on December 26, 1963. Larry Abrahams testified that he and Ervin Hager, at Herman David's request, stole the automobile described in Count 17 and later delivered it to Bradley Wright, and he purchased the automobile for $2,000.00. Abrahams gave Wright a blank Indiana title, which he had received from Herman David and Wright filled it in. (App. 266-267).

TOCCO CAR (Count 21)

It was stipulated that a blue, 1964 Cadillac stolen in Elkhart, Indiana on June 5, 1964 was sold in Illinois on an Indiana title made out in the name of John Brante on June 6, 1964 (App. 73).

IATAROLA CARS (Counts 18-20, 22-30)

It was stipulated that these cars were stolen between February 1, 1964 and February 1, 1965. They were titled upon application of a fraudulent title and subsequently sold to third parties.

REASONS FOR GRANTING THE WRIT

I.

THE INFERENCE OF KNOWLEDGE OF THE STOLEN CHARACTER OF PROPERTY ALLOWED TO BE DRAWN FROM RECENT POSSESSION OF STOLEN PROPERTY VIOLATES DUE PROCESS.

The Court, over the objections of the petitioners, instructed the jury that:

> "Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case that the person in possession knew the property had been stolen.
>
> If the jury should find beyond a reasonable doubt from the evidence in the case that the automobiles described in the indictment were stolen, and that while recently stolen the property was in the possession of the accused, the jury would ordinarily be justified in drawing from those facts the inference that the automobiles were possessed by the accused with knowledge that the property was stolen, unless possession of the recently stolen property by the accused is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case.
>
> In considering whether possession of recently stolen property has been satisfactorily explained, the jury will bear in mind that in the exercise of constitutional rights, the accused need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence independent of any testimony of the accused.

> It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits the jury to draw from possession of recently stolen property." (App. 388)

We respectfully submit that to allow the jury to draw this inference violates due process. In *Tot* v. *United States*, 319 U.S. 463, this Court held that in order to make proof of one fact or group of facts evidence of the ultimate fact on which guilt is predicated there must be a "rational connection between the fact proved and the ultimate fact presumed * * * where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." 319 U.S. 463, 467-468. We submit that the allowance of the inference to be drawn from the possession of property recently stolen, that the possessor knows it to be stolen, is without rational connection between fact proved (possession) and the ultimate fact presumed (knowledge of the stolen character). Is it not as reasonable to infer that the thief would desire to dispose of property as soon as possible into the hands of an innocent purchaser as it is to presume that the innocent purchaser had knowledge of the thief's actions? In *United States* v. *Romano*, 382 U.S. 136, this Court struck down a presumption that mere presence at a still was sufficient evidence to authorize conviction for the possession, custody and control of that still unless the defendant explained his presence to the satisfaction of the jury. The court in striking down this provision stated:

> "But presence tell us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, de-

> livery or operational activity having nothing to do with possession. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt 'the inference of the one from proof of the other is arbitrary * * *.' *Tot v. United States*, 319 U.S. 463, 467."

Similarly, mere possession of property which has been recently stolen tells us nothing about the part that the defendant played in either the theft or the disposition of that stolen property. To place upon him a burden to explain his possession under the amorphous standard of "satisfaction of the jury" we submit violates due process.

Nor can the defendant derive any comfort in the distinction without difference between "presumption" and "inference" since they "tend to shift the burden to the defendant however piously we may say and tell juries that they do not." *Rogers v. United States*, 402 F.2d 830, 834 (9th Cir. 1968).

II.

WHERE THE SOLE EVIDENCE AGAINST THE PETITIONER CONSISTS OF AN INFERENCE IT CANNOT PROPERLY BE SAID THAT A VIOLATION OF BRUTON v. UNITED STATES, 391 U.S. 123 IS HARMLESS.

Prior to trial, the petitioner Nasse filed a motion for severance. As one of the grounds in support of that motion was stated as follows:

> "As a further ground for severance these movants state that they fear that certain co-defendants, for reasons known only to themselves, which although not admissible against your movants would be admissible against the declarant, to the prejudice of your movants." (App. 47)

This motion was denied and the case proceeded to trial. In the opening statement for the Government, the theory of the Government's case was disclosed. The theory was that beginning in March of 1962 until disclosure by the arrest of the Nasses and Rudy Geidans on September 27, 1962, the Nasses and Geidans received stolen automobiles in Ohio and disposed of them in automobile auctions in Pennsylvania. The prosecution's theory was that the scene of disposal and characters then shifted and continued in other forms until 1965. At the conclusion of the opening statement, Nasse again moved for a severance which was denied. (App. 86-87).

The Government called William R. South, an officer of the City of Columbus, Ohio Police Department, to testify concerning George Nasse's possession of the automobile described in Count 7 on September 27, 1962. On cross-examination, he testified that on that date he arrested George Nasse, Peter Nasse and Rudy Geidans. (App. 97)

Subsequently when the prosecution sought to introduce a conversation between Frank Scarcelli and the petitioners, Robert and Orland David, in the Fall of 1962, the petitioner Nasse objected on the basis that his participation in the conspiracy, if any, had terminated at his arrest. At that time, the trial court indicated that he agreed and stated:

> "They don't have to show anything as far as their withdrawing. If they had been arrested, I think that in effect indicates they have withdrawn, unless the government has some other evidence to show that there is a renewal of their participation in this conspiracy."

This statement of the trial court was, of course, a statement from well-established law. *United States v. Consolidated Laundries Corporation*, 291 F.2d 563, 573 (2d Cir., 1961); *United States v. Carminati*, 247 F.2d 640 (2d Cir.,

1957); *United States* v. *Russano*, 257 F.2d 712, 715-716 (2d Cir., 1958); *Sandez* v. *United States*, 239 F.2d 239, 243 (9th Cir., 1956); *Cleaver* v. *United States*, 238 F.2d 766, 769. And subsequent to their withdrawal from the conspiracy, no statements by any conspirator could be admissible against Nasse. *Van Riper* v. *United States*, 13 F.2d 961 (2d Cir., 1926); *Logan* v. *United States*, 144 U.S. 263, 309. Faced with this statement, the prosecution then informed the court that there would be more evidence in relation to Nasse's continuing participation in the conspiracy. On this basis the court overruled the objection and permitted the testimony to stand as against all defendants. (App. 115)

Thus Nasse was forced to have his guilt or innocence determined in a trial which subsequently introduced evidence relating to the cars described in Counts 8 through 30 with no mention of George Nasse or his continued participation in the alleged conspiracy.

One of the final witnesses for the Government, Larry Abraham, testified that he had first met Herman David in the first part of 1963, at least four months after the arrest of George Nasse. He then testified:

> "Approximately two or three months after I met Herman David, I was in his home at 14823 Grant Street in Dolton, Illinois. He said that he and his two sons, Bob and Orland David, and Art Dinngelo, sold cars to a dealer in Ohio. At that time he did not tell me anything of the source of these automobiles. A month or so later he said that they had a good thing going for them, in Ohio, except that the dealers in Ohio got busted, they got arrested in another state with hot cars. * * * He told me that automobiles were a good business and he brought up again that the Ohio incident that they had sold a lot of cars to this dealer in Ohio, and had made a lot of money, a lot of profit." (App. 263-264)

Again Nasse objected to this testimony and moved for a severance on the basis that the evidence had affirmatively established that he had withdrawn from the conspiracy as of September 27, 1962. The Government opposed the motion for severance by stating that by virtue of the fact that Nasse had once possessed some of the automobiles described in the indictment, that he was still a member of the conspiracy and that the arrest was not sufficient to cause a withdrawal. The Government then made the startling assertion that once a defendant is shown to be in a conspiracy, the subsequent statements of a co-conspirator can be charged against that defendant, even if he did withdraw. (App. 276). The court again allowed the evidence to stand as to all defendants. (App. 277).

On cross-examination of Mr. Abrahams, the following occurred:

> "Q. Mr. Abrahams, you testified, I believe, on direct examination, that in June or July of 1963, you had a conversation with Herman David and he told you that the automobile dealer to whom he had sold cars in Ohio had been busted; is that correct?
>
> A. Yes, sir.
>
> Q. Did he also tell you that because this man had been busted, that this operation ceased?
>
> A. Yes, on account of them being arrested or busted, yes." (App. 280-281)

The final witness for the Government was Ervin Hager. After testifying that he had stolen some automobiles and that he was arrested in January of 1965 and prosecuted for the interstate transportation of stolen motor vehicles in Sioux Falls, South Dakota, he testified as follows:

> "Subsequent to my arrest in January of 1965, I was in the home of Herman David. At that time I had a conversation with him.
>
> Mr. Cogan: May I ask against what defendants this conversation is being offered?

Mr. Sykes: All.

Mr. Crowley: I object to the conversation.

The Court: I will let it in subject to the objections. Let's proceed. You may answer.

The Witness: Subsequent to that conversation, I had other conversations with him relative to automobiles in other states. It was sometime around the end of March. We had been discussing going into Ohio and see some dealers that he knew there, that he hadn't seen in some time. He told me previously he delivered some hot cars up there, and they should be ready for some more, and some weekend we were to take a drive up there and see if they were ready to start taking delivery again." (App. 294)

The petitioner Nasse again moved to strike this testimony and for a severance. However, the Government still persisted in arguing to the court that the arrest was not sufficient to show an affirmative withdrawal. However, the court then stated:

"I think the point is well taken. I don't see how that could be admissible as to those defendants."

The court then reserved ruling on the motions. (App. 299).

On subsequent argument on this point, the prosecution finally admitted that they agreed with the position of George Nasse, and that a declaration by a co-conspirator subsequent to his arrest would not be admissible against him. (App. 319). The petitioner Nasse again moved for a severance but this motion was denied, even in light of the prosecution's admission that this inadmissible testimony would "torpedo" Nasse. (App. 321). The court instructed the jury that statements or acts of alleged co-conspirators occurring after September 27, 1962 were not admissible against the petitioner, George Nasse. (App. 338). And in its final charge to the jury, the court again

attempted to instruct the jury that they could not consider acts or declarations of other alleged participants occurring after September 27, 1962 against the petitioner, George Nasse (App. 385-387).

We respectfully submit that the admission of these post-withdrawal inculpatory statements by alleged co-conspirators so sorely prejudiced the petitioner Nasse as to deprive him of a fair trial. And the error was not cured by the Court's good faith efforts to repair the damage caused by the prosecution. *Bruton* v. *United States*, 391 U.S. 123. At the court there stated:

> "It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as was recognized in *Jackson* v. *Denno*, *supra*, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt* v. *Utah*, *supra*; *Throckmorton* v. *Holt*, 180 U.S. 552, 567; *Mora* v. *United States*, 190 F.2d 749; *Holt* v. *United States*, 94 F.2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given and recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. *Pointer* v. *Texas*, *supra*."

The Court of Appeals, even though the only other evidence against the petitioner Nasse consisted of the inference to be drawn from the recent possession of stolen property held this error to be harmless. In support of this holding the Court relied on *Harrington* v. *California*, 395 U.S. 250. None of the circumstances in *Harrington* were present here. In *Harrington* the properly admissible evidence was overwhelming as to the defendant's guilt; here the guilt of this defendant is supported solely by the slender reed of an inference.

III.

WHERE THE SOLE EVIDENCE AGAINST THE PETITIONER CONSISTS OF AN INFERENCE IT CANNOT PROPERLY BE SAID THAT A VIOLATION OF MIRANDA v. ARIZONA, 384 U.S. 436 and GRIFFIN v. CALIFORNIA, 380 U.S. 609 IS HARMLESS.

The prosecution called an F.B.I. agent named Davis to testify to certain conversations between Davis and George Nasse. A motion to suppress these statements on the ground that the petitioner was not warned that he had a right to remain silent and that he had a right to have an attorney present during the interview, was made, voir dire was had, and the motion was denied.

Davis then related the conversation that he had with Nasse concerning his purchase of automobiles. (App. 99-102). Davis then testified:

> "I asked him also if he had his checks and other records of these transactions. He told me that they were in the custody of his attorney in Pittsburgh, Pennsylvania. I asked him if he would make them available. *At that time he declined.*" (App. 102)

A motion for mistrial was denied. (App. 102). To further compound this error, the prosecution, in final argument stated:

> "Mr. Nasse volunteered for the agent to produce the checks and records, but those checks and records were never produced—never produced to the agent to show anything concerning the price paid for these cars, or the persons from whom the Nasses, George Nasse got the car." (App. 376)

There can be no doubt that Nasse possessed the privilege against self-incrimination as to his books and records, *Boyd* v. *United States*, 116 U.S. 616; *Wilson* v. *United States*, 221 U.S. 361, and as no ritualistic formula is necessary in order to invoke the privilege, *Quinn* v. *United States*, 349 U.S. 155, 164, his refusal to produce the requested records was clearly a claim of privilege. Nor can there be any doubt that Nasse did not waive the privilege completely and that he had a right to claim it at any time during the interrogation. *Miranda* v. *Arizona*, 384 U.S. 436, 473-474.

By allowing the prosecution to elicit this testimony during trial and then to have the prosecution distort the testimony and say that Nasse volunteered to turn over records and then never turned them over was the granting of carte blanche to the prosecution to comment on his claim of privilege during interrogation and failure to testify during trial. *Griffin* v. *California*, 380 U.S. 609; *Baker* v. *United States*, 357 F.2d 11, (5th Cir., 1966); *Fagundes* v. *United States*, 340 F. 2d 673, (1st Cir., 1965).

This violation was especially prejudicial to the petitioner Nasse since the sole evidence against him was the slender reed of inference.

IV.

WHEN THE EVIDENCE FAILS TO ESTABLISH ANY CONNECTING LINK BETWEEN VARIOUS PORTIONS OF AN ALLEGED CONSPIRACY THERE IS A FATAL VARIANCE. THIS CASE PRESENTS THE PROPER VEHICLE FOR THIS COURT TO CLARIFY THE RULE OF KOTTEAKOS v. UNITED STATES.

The proof adduced by the Government, viewed in a light most favorable to it, we submit, failed to establish the single conspiracy charged.

Taken in such a light, the evidence established that Herman David was the source of the automobiles and titles delivered to George Nasse between April and September 16, 1962. Mirror images of the Illinois titles for the cars described in Counts 2 and 3 were found during the search of David's home. Indiana titles, which an expert witness testified were prepared from the same common source as the titles for the cars described in Counts 5, 6 and 7, were found in searches of David's home and truck.

Viewed in a light most favorable to the Government, the evidence, as it relates to Counts 8 through 16, cars stolen between September 16, 1962 and November 29, 1963, if inference is allowed to be based on inference, tends to indicate that the same die stamps used to place the altered serial numbers on the cars described in Counts 3 and 4 were also used to place the altered serial numbers on the cars described in Counts 8 through 12 and that the die stamp used on one number in the car described in Count 12 was also used on the cars described in Counts 13 through 16. From the evidence of the die stamps, the Government argues that Herman David was also the source of these cars.

This inference upon inference is evolved in the following manner: Mirror images for the Illinois titles which George Nasse presented to obtain Ohio titles for the cars described in Counts 2 and 3 were found during the search of Herman David's home. Indiana titles found in searches of Herman David's home and truck were found to be, by an expert witness, derived from the same common source as the Indiana titles used by George Nasse to obtain Ohio titles for the cars described in Counts 5 through 7. Papers which had been in the automobile described in Count 7, at the time it was stolen, were found in searches of Herman David's home. Thus, it was permissible, based upon these circumstances, and viewing the evidence in a light most favorable to the Government, to draw an inference that Herman David was the source of the automobiles and titles described in Counts 2 through 7.

The only evidence which established any link between these automobiles and the cars described in Counts 8 through 16 was the testimony of Robert Zimmers, a Special Agent of the Federal Bureau of Investigation, assigned to the FBI Laboratory. He testified (App. 216-217), that he had examined plastic impressions of the serial numbers taken from the cars described in the indictment, and that from an examination of these plastic impressions, blow-ups of photographs and comparisons under microscope, that the altered serial numbers on the automobiles described in Counts 3, 4, 8, 9, 10 and 11 and the serial number in one place on the automobile described in Count 12 were all made by the same die stamp, a 3/16" character. He further testified that an examination of the die of the serial number taken from another portion of the automobile described in Count 12 and a comparison to the plastic die impressions taken from the automobiles described in Counts 13, 14 and 16 led him to the conclusion that those numbers were made from the same die stamp, a ¼" character.

There was no evidence introduced by the Government showing any connection between the cars named in Counts 8 through 16 and those named in Counts 17 through 30.

Thus, the apparent theory of the Government to attempt to connect the defendants, Robert and Orland David, to the general conspiracy charged was that Herman David was the source of the automobiles in Counts 2 through 7 and since the die stamps used on the Count 3 and 4 automobiles were the same as those used on the 8, 9, 10, 11 and 12 automobiles, that he also must have been the source of the Count 8 through 16 automobiles. Such a theory, we submit, is completely without foundation. The basic premise of the theory is merely an inference. It is inferred that because objects were seized during the various searches which tended to connect Herman David to the Count 2 through 7 automobiles that he was the source of those automobiles. However, the next step in the theory cannot be legally made. The Government attempted to draw a further inference from the die stamps that Herman David was the source of the Count 8 through 16 automobiles. This theory piles inference upon inference and must fail. *United States* v. *Russo*, 123 F.2d 420 (3d Cir., 1942); *Wheaton* v. *United States*, 113 F.2d 710 (3d Cir., 1942); *Gallegos* v. *United States*, 237 F.2d 694 (10th Cir., 1956); *Sapir* v. *United States*, 215 F.2d 722 (10th Cir., 1955); *Rosenberg* v. *United States*, 120 F.2d 935 (10th Cir., 1941); and *McNeely* v. *United States*, 353 F.2d 913 (8th Cir., 1965).

The car described in Count 17, sold to Bradley Wright, was stolen by Hager and Abraham at Herman David's request on December 26, 1963. There was no testimony, expert or otherwise, that this car was connected to any other car mentioned in the indictment, by similarity of die stamps or titles. Its only possible connection was one of

the thieves, Hager, who also testified that he stole the car described in Count 21.

The only testimony tending in any manner to connect the Count 21 car to the overall conspiracy charged, was a common thief with Count 17, and a common source for its title with the cars described in Counts 5 through 7, and the Indiana titles discovered in Herman David's home and truck. (App. 241). Again, permitting the inference, in addition to the testimony of Hager relative to obtaining titles from Herman David (App. 293) that Herman David was the source of the title.

The cars described in Counts 18 through 30 (Intarola cars) were stolen between February 1, 1964 and February 1, 1965. Although there are 12 counts, these counts relate to seven cars.[1] The evidence tending to support the inference that Herman David was the source of these cars again came from the expert witness Bohn who testified that the titles for the cars described in Counts 19, 21, 25, 27, 29 and 30 came from the same common source as the cars in Counts 5, 6 and 7 (Nasse cars), Count 21 (Tocco car) and the titles seized during the searches of Herman David's home and truck.

We therefore submit that this evidence, viewed in a light most favorable to the Government, and basing inference upon inference, completely fails to establish the single, unified conspiracy charged in Count 1 and even in the best light for the Government, establishes five separate and distinct conspiracies with only one common figure, Herman David. There is no connecting link between any

[1] The following counts both involve the same car: 18 and 25, 20 and 30, 22 and 26, 24 and 27 and 28 and 29; the latter counts relating to ultimate disposition. There was a finding of not guilty on Counts 23 and 29.

of the five separate conspiracies other than Herman David. This is a classical example of spokes meeting at a common center, with no connecting rim. As this Court stated in *Kotteakos v. United States*, 328 U.S. 750, 768:

> "The jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans." (pp. 1249-1250, 66 S.Ct.)

We respectfully submit that the Court's remarks in *Kotteakos* are manifestly controlling here. There was no proof of the single conspiracy charged in the indictment, and the defendants were irreparably prejudiced and damaged. This case presents a proper vehicle for this Court to clarify the rule of *Kotteakos* and provide guidelines to be followed by the District Courts.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

JOHN POWERS CROWLEY
105 West Adams Street
Chicago, Illinois 60603
Attorney for Petitioners

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

Nos. 16460, 16461, 16462, 16463, 16464

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE NASSE, ALBERT TOCCO, ORLAND DAVID, ROBERT DAVID, HERMAN DAVID and JOSEPH IATAROLA,

Defendants-Appellants.

July 31, 1970

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Before FAIRCHILD and KERNER, *Circuit Judges*, and ESCHBACH, *District Judge*.[1]

FAIRCHILD, *Circuit Judge*. This case concerns transactions in which automobiles were stolen, their identifying numbers altered, spurious state title documents created, and the automobiles sold in different states.

[1] Judge Eschbach is sitting by designation from the Northern District of Indiana.

The indictment contains 30 counts. Count 1 charges a conspiracy among thirteen defendants and others. Each other count charges one or more defendants with interstate transportation of a particular stolen automobile. Five pairs of counts each relate to one automobile, but each of the pair charges a separate transportation of that automobile.

Ten defendants were involved in the trial now under consideration. The charges against Cobb, Wright, and Abraham had been severed, and these men were government witnesses. Four of those tried were acquitted, Geidens on motion at the close of the evidence, and Peter Nasse, McGurk, and Nash, by the jury.

The verdicts as to the remaining six, now appellants, were as follows: Herman David had been charged in the conspiracy count and in one transaction count for each of the automobiles involved except one. He was found guilty in counts 1 through 20, 24, and 28; not guilty on counts 22 and 23. Herman's sons, Robert (Bob) and Orland (Joe), had been charged in the conspiracy count and transaction counts 2 through 16. They were found guilty on count 1 and counts 8 through 16, but not guilty on counts 2 through 7. Joseph Iatarola had been charged in the conspiracy count and five transaction counts. He was found guilty on count 1 and counts 25, 26, 27, and 30, and not guilty on count 29. Albert Tocco had been charged in the conspiracy count and count 21. He was found guilty on both. George Nasse had been charged only in the conspiracy count, and was found guilty.

Count 1 charged a conspiracy knowingly to transport stolen motor vehicles in interstate commerce, to receive, conceal, store, barter, sell and dispose of such stolen motor vehicles, and knowingly to transport counterfeit securities (the spurious state titles) in interstate commerce.

The conspiracy was said to include stealing motor vehicles, stealing serial plates from other motor vehicles and attaching them to the stolen vehicles, altering the identification numbers on the frames of the stolen ones so as to agree, preparing counterfeit state titles for use in selling and retitling the vehicles, and transporting the stolen vehicles to other states for sale. The conspiracy was alleged to have existed from April, 1962 to November, 1965, when the indictment was returned.

The evidence fully established the pattern described, and Herman David as the central figure, supervising the transactions and creating the spurious titles.

Counts 2 through 7 relate to automobiles stolen in Illinois from April 14, 1962 to September 11, 1962. These cars have been referred to as the Nasse cars, since in each case George Nasse, of Youngstown, Ohio, obtained an Ohio title before selling the car. Counts 8 through 12 relate to automobiles stolen in Illinois from September 16, 1962 to December 20, 1962. These cars were sold in California, and have been referred to as the Scarcelli cars, from the name of the dealer who took them to that state.

Counts 13 through 16 relate to automobiles stolen in Illinois or Indiana from September 3, 1963 to November 29, 1963. These cars were sold in Missouri, Ohio, and Pennsylvania, and have been referred to as the Lasky cars (so named from a conspirator who was a witness). Count 17 relates to an automobile stolen in Illinois December 26, 1963 and sold in Indiana. It is referred to as the Wright car. Counts 18 & 25, 19, 20 & 30, 22 & 26, 23, 24 & 27, and 28 & 29 relate to cars stolen in Illinois from February 1, 1964 to February 1, 1965 and titled in other states. They have been referred to as the Iatarola

cars. Count 21 refers to a car stolen June 5, 1964 in Indiana and sold in Illinois. It is referred to as the Tocco car.

Herman David concedes the sufficiency of the evidence, but contends on appeal that much of it was derived from unlawful search. There can be no real question of the sufficiency of the evidence as to each transaction count upon which any defendant was convicted. The defendants other than Herman make various claims, including the claim that the government failed to prove the conspiracy charged and that they were prejudiced by a joint trial of the other charges, and the consideration by the jury of the statements and acts of their co-defendants as co-conspirators.

1. THE CLAIM OF VARIANCE AS TO THE CONSPIRACY COUNT.

Defendants allege that the evidence showed no more than a number of separate conspiracies in which Herman was one of the conspirators. They rely on *Kotteakos* v. *United States*.[2]

Here, unlike *Kotteakos*, the defendants knew that illegal acts on the part of a chain of participants—thieves, counterfeiters, camouflagers, people to transport the stolen autos, and salesmen—were necessary to the total operation. As stated in *Blumenthal* v. *United States*,[3]

> "The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing

[2] (1946), 328 U.S. 750, 66 SCt. 1239, 90 LEd. 1557.

[3] (1947), 332 U.S. 539, 68 SCt. 248, 92 LEd 154.

> in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.
>
> • • •
>
> "All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end, to aid in disposing of the whiskey. True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan."[4]

It is true that the participants other than Herman (and perhaps his sons) changed from time to time. Some were shown to have been added and some withdrew, but the participation of some overlapped the participation of others. We deem it reasonable to consider the operations as those of a going concern, understood by all to be so, with changes in personnel, rather than as separate transactions or groups of transactions.

As stated in *United States* v. *Varelli*:[5]

> "While the parties to the agreement must know of each other's existence, they need not know each other's identity nor need there be direct contact. The agreement may continue for a long period of time and include the performance of many transactions. New parties may join the agreement at any time while others may terminate their relationship. The parties are not always identical, but this does not mean

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[4] *Id.* at 558-9. See also 332 U.S. at 554 n. 14, and *United States* v. *Borelli* (2d Cir., 1964), 336 F2d 376, 383 n. 2, cert. den., 379 U.S. 960 (1965).

[5] (7th Cir., 1969), 407 F2d 735, 742.

that there are separate conspiracies. See Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 922-35 (1959).[6]

II. THE CLAIMS OF GEORGE NASSE.

(1) Nasse was not charged in any transaction count, and claims that the evidence was insufficient to show that he was a member of the conspiracy. It is the government theory that his conduct shows he had an agreement with other participants to receive and dispose of the stolen cars.

Nasse is a used car dealer in Youngstown, Ohio. In 1962 he sold a number of used cars at an auction in Pennsylvania. Six of them were the stolen cars involved in counts 2 through 7 and another was a stolen car not involved in any transaction count. Nasse obtained Ohio titles for each before selling it. In each instance he presented a spurious Illinois or Indiana title which named as owner some automobile dealer who in fact never owned a car of that description. The three Illinois titles were purportedly notarized by the same notary, but the signatures were not genuine and the real notary's notary public stamp had disappeared before these titles were notarized. Three of the four Indiana titles were purportedly notarized by the same notary and the fourth by a different one, but neither notary had ever been commissioned in Indiana.

The cars were a Thunderbird, stolen April 14 and titled by Nasse April 16; a Cadillac stolen May 4 and titled May 15; a Cadillac stolen May 16 or 17 and titled May 23; a Cadillac stolen August 8 and titled August 15; a Cadillac stolen September 7 and titled September 14; a Cadillac stolen September 11 and titled September 18;

[6] See also *Blumenthal, supra*, at 556-7.

and a Cadillac stolen September 6 and titled September 18. Illinois titles were presented for the cars stolen April 14, May 4, and May 17; Indiana titles for those stolen August 8, September 7, September 11, and September 6. When ultimately recovered, each car bore a serial plate which had been removed from some other car, as did all the cars involved in the other transaction counts.

There was opinion testimony that the Indiana titles used by Nasse came from the same source as the Indiana titles used in re-titling the cars involved in counts 18 & 25, 19, 20 & 30, 24 & 27, and 28 & 29 (Iatarola) and in count 21 (Tocco). There was opinion testimony that false numbers on the cars stolen May 4 and 17 were made with the same stamp as those on cars involved in counts 8, 9, 10, 11, and 12 (Scarcelli). There was sufficient evidence linking the false titles with Herman.

Thus there was ample evidence that these seven cars received, titled, and sold by Nasse had in fact passed through the hands of Herman David and other conspirators. We think also that the circumstances, particularly including the short period of time in each case between the theft and the handling by Nasse, and the repetition of the pattern seven times in five months, demonstrates a sufficient probability that Nasse was a knowing and willing participant in the scheme so that in the absence of a satisfactory explanation an inference may properly be drawn accordingly.

Nasse did not testify. He was arrested in September, 1962, by Ohio officers because of his possession of a stolen automobile and there is no proof that he was active in the conspiracy after that date. In February and March 1963 he was interviewed by FBI agent Davis about 23 cars which were found to have been stolen and which

Nasse had sold at car auctions. Nasse was not in custody and voluntarily came to the office where he was interviewed. Nasse told the agent he obtained these cars from an individual he knew only as Stan; that he had met Stan casually in November, 1961 at an auction; Stan showed up in March, 1962 at Nasse's place of business with a Cadillac to sell; Nasse bought and Stan came back a number of times between March and September; Stan furnished Illinois or Indiana titles; Nasse never knew Stan's last name nor how to get in touch with him; Nasse would take Stan to the bank, make out a check to cash, cash it and give Stan the proceeds; Nasse paid from $3500 to $4500 for each car and made a profit of only $50 to $150 on each car.

We think the jury was entitled to consider this narrative, as it evidently did, a fairy tale, and that Nasse's telling it strengthened rather than weakened the proof against him.

(2) The court instructed the jury, in substance, that possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence that the person in possession knew the property had been stolen; and further instructed that it was the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence warrant such inference.

Defendant appears to rely on cases dealing with presumptions rather than permissible inferences. We see no error in the instruction.[1]

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[1] See *United States* v. *Hood* (7th Cir., 1970), 422 F2d 737, 741; *United States* v. *Riso* (7th Cir., 1968), 405 F2d 134, 137-8.

(3) Nasse was arrested September 27, 1962, and the court instructed the jury that statements or acts of the alleged conspirators after that date should not be considered against Nasse.

Two government witnesses testified to conversations with Herman in which he said that a lot of cars had been sold to "dealers in Ohio" until these dealers were arrested with hot cars. These conversations occurred after September, 1962. Herman did not name or otherwise identify the dealers, but, since Nasse was a dealer in Ohio and had been arrested, the statements attributed to Herman were consistent with, and to some degree corroborative of, the other evidence against Nasse. Herman did not testify.

Nasse sees here an application of the *Bruton* principle that admission of a statement of one defendant, inculpating another, violates the latter's right of confrontation if the former does not take the stand, and prejudice is not avoided by a limiting instruction.[8] We note that Herman's statements were not made under circumstances where Herman was trying to shift or share the blame, a factor mentioned in *Bruton*. Their effect on Nasse's case was not "powerfully incriminating", nor "devastating".[9]

But assuming applicability of *Bruton* to the extent of any discernible corroborative effect, we are convinced beyond a reasonable doubt, that the jury would have reached the same verdict even if these two statements,

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[8] *Bruton* v. *United States* (1968), 391 U.S. 123.

[9] See *Bruton*, p. 135-6; *Slawek* v. *United States* (8th Cir., 1969), 413 F2d 957, 961-4, and cases cited therein.

and one other item of evidence, to be discussed, had not been before it.[9a]

(4) We have already mentioned the interview of Nasse by Agent Davis. In the course of it David asked Nasse whether he had his checks and other records of his transactions with Stan. Nasse replied they were in the custody of his attorney. Davis asked if Nasse would make them available, but Nasse declined. In final argument, apparently with this testimony in mind, but mistakenly, the prosecutor referred to Nasse's volunteering to produce his records, but failing to do so. It is not perfectly clear that Nasse's declination under these particular circumstances must enjoy the full sanctity of a claim of his constitutional right not to incriminate himself. In any event, we are convinced, as before stated, that the jury would have reached the safe verdict if Davis had not testified that Nasse declined to produce his records and if the prosecutor had not made his misstatement.

III. SEARCH AND SEIZURE ISSUES.

(1) *Search of Herman David's truck on September 9, 1965.*

FBI Agent Robert L. Zimmerman obtained a warrant from the United States Commissioner to search Herman's truck. Zimmerman's affidavit described the truck and stated the address in the vicinity of which it was parked. Zimmerman stated that he had reason to believe that there were, concealed in the truck, "printing plates designed for manufacturing counterfeit checks" which had been used to commit a federal offense.

The facts relied on were stated as follows:

"That an informant has advised affiant that one Herman David has obtained from a printer in Grif-

[9a] *Harrington* v. *California* (1969), 395 U.S. 250.

> fifth, Indiana, certain counterfeit checks drawn on a Gary, Ind. bank, all of which has been transported in interstate commerce from Chicago Heights, Ill. to Gary, Ind.; further that Herman David now has concealed in the aforesaid vehicle certain printing plates used to manufacture said counterfeit checks. That aforesaid vehicle is known to affiant as a green Ford panel truck parked at the above location.
> "Affiant states that other F.B.I. agents have informed him that a truck of the description in the caption hereof is parked at the location set forth above.
> "Affiant states that said informant informed the F.B.I. on a prior occasion of the whereabouts of a fugitive who was later there apprehended."

Applying the *Aguilar* test,[10] Zimmerman's affidavit fulfills the requirement that it state "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' . . . ." It does not explicitly meet the other *Aguilar* test of stating "some of the underlying circumstances from which the informant concluded that the [items to be sought] were where he claimed they were", but we think there was sufficient detail and corroboration so as to permit the commissioner to decide that the tip was sufficiently trustworthy, as explained in *Spinelli*.[11] The informant had supplied such details as the location of the printer of counterfeit checks printed with the plates being sought, the location of the bank on which they were drawn, and the places between which the checks had been transported. Zimmerman said he had personal knowledge of the truck as well as verification from other agents of its present location. A magistrate may infer from sufficiently detailed information "that the informant had gained his information in a reliable way."[12]

[10] *Aguilar* v. *Texas* (1964), 378 U.S. 108, 114.

[11] *Spinelli* v. *United States* (1969), 393 U.S. 410, 415-419.

[12] *Spinelli*, p. 417.

The search of the truck produced a very substantial amount of evidence relevant to this case, and it was properly admitted.

(2) *Search of Herman's house on September 9, 1965.*

In the evening of September 9, an Illinois circuit judge issued a warrant for the search of Herman's home. A state police officer made the application. His affidavit requested a warrant to search the residence and to seize counterfeit Illinois drivers' licenses and certificates of title used to commit a particular state offense. The facts supporting probable cause were stated as follows:

> "Complainant has received evidence of this crime from an informant; said informant has previously given complainant evidence of crimes and he has proved himself to be reliable in that arrests and convictions have resulted from information given by him."

The affidavit is clearly insufficient for failure to show probable cause and the resulting search and seizure violated Herman's fourth amendment rights.

(3) *Searches incident to arrest.*

The indictment in this case was issued November 12, 1965 and warrants issued for 13 defendants who would probably be found in widely separated locations.

Joe David was arrested in his home at 4:00 a.m., November 20. Agents searched his home and attached garage and discovered a radio capable of receiving FBI calls in the seat of a car in the garage. The search concluded about 5:30 a.m.

Herman was arrested in his home at 7:15 a.m. A thorough search of the home was conducted by eleven agents, looking for "license plates for cars, titles for cars, anything that would indicate an operation involving cars." The search consumed about two hours.

Defendants assert that the searches were unreasonable because the arrest warrants were eight days old when executed. The government answers that in view of the nature of the charges, the number of defendants and the location of their residences the FBI acted reasonably in effecting the simultaneous arrests of these defendants to prevent their flight or the destruction of evidence. We find that the delay involved here was not unreasonable.[13]

Defendants also contend that the scope of the searches here violated their rights under the fourth amendment. We would agree if *Chimel* v. *California*[14] were to be given retroactive effect.

The Supreme Court, however, has not applied *Chimel* retroactively[15] and several circuits, including the seventh, have held that *Chimel* is not to be applied to searches occurring prior to June 23, 1969, the date of the *Chimel* decision.[16] Thus, this case will be considered under pre-*Chimel* law.

Prior to *Chimel*, a search incident to a lawful arrest could reasonably extend to any area considered to be in the "possession" or under the "control" of the person

[13] See *Williams* v. *United States* (9th Cir., 1969), 418 F2d 159.

[14] (1969), 395 U.S. 752.

[15] See *Von Cleef* v. *New Jersey* (1969), per curiam, 395 U.S. 814; *Shipley* v. *California* (1969), per curiam, 395 U.S. 818; and *Vale* v. *Louisiana*, 38 L.W. 4544.

[16] *United States* v. *Blassick* (7th Cir., 1970), 422 F2d 652; *United States* v. *Bennett* (2d Cir., 1969), 415 F2d 1113; *Lyon* v. *United States* (5th Cir., 1969), 416 F2d 91; *Williams* v. *United States* (9th Cir., 1969), 418 F2d 159, 161; *Whiteley* v. *Meacham* (10th Cir., 1969), 416 F2d 36.

arrested.[17] The prior law was summarized in *United States ex rel Mahoney* v. *LaVallee*:[18]

> "In *Harris, supra*, a thorough five-hour search of a four-room apartment was found to be incidental to a lawful arrest in the living room of an apartment, although it was apparent on the facts that, since the accused had been taken into custody, there was no danger that he would destroy the fruits or instrumentalities of the crime in the apartment or use a weapon hidden in it. And in *Rabinowitz, supra*, a search of a one-room office was held incidental to an arrest made there, although here too it was clear that the immediate search of the entire office without a warrant was not necessary to protect the arresting officers or to prevent the destruction of the fruits of the crime. . . . And, we are reassured that the Supreme Court still adheres to its pronouncement in *Rabinowitz*, for it recently stated, it is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.' *United States* v. *Rabinowitz*, 339 U.S. 56, 66, 70 S.Ct. 430. *Cooper* v. *State of California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967). See also *Ker* v. *State of California*, 374 U.S. 23, 41-42, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963)."

We find no valid distinction between the case at hand and the *Harris* and *Rabinowitz* cases. As noted in *Chimel*,

> "It would be possible, of course, to draw a line between *Rabinowitz* and *Harris* on the one hand, and this case on the other. For *Rabinowitz* involved a single room, and *Harris* a four-room apartment, while in the case before us an entire house was searched. But such a distinction would be highly artificial. The

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[17] See *Chimel*, 395 U.S. at 760.

[18] 396 F.2d 887, 888 (2d Cir., 1969), cert. den. 395 U.S. 985 (1969).

rationale that allowed the searches and seizures in *Rabinowitz* and *Harris* would allow the searches and seizures in this case."[19]

Thus, we conclude that the defendants' fourth amendment rights were not violated in the searches at the time of the arrests.[20] These searches did not involve "mass seizures" of the entire contents of the houses.[21] Rather, "there was fair basis for belief that the place searched . . . would contain instruments or fruits of the crime for which the arrest was made."[22] Moreover, the facts of this case, involving an alleged conspiracy, suggest that the possibility of destruction of the incriminating evidence was not remote. The fact of the presence of two other people in Herman's home and a phone call received by him also suggest that an immediate search may have been necessary to preserve material subject to seizure.

(4) *The standing of defendants other than Herman to object to the September 9 search of Herman's house.*

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[19] 395 U.S. at 766.

[20] The search in *United States* v. *Francolino* (2d Cir., 1966), 367 F2d 1013, cert. den., 386 U.S. 960 (1967) was similar to that of Joe David's car. As to the search of Herman's house, see *United States ex rel Mahoney* v. *LaVallee, supra; United States* v. *Durham* (7th Cir., 1969), 409 F2d 1170; *United States* v. *Blassick, supra; United States* v. *Satterfield* (7th Cir., 1969), 410 F2d 1351; *United States* v. *Valdes* (2d Cir., 1969), 417 F2d 335; *United States* v. *Baratta* (2d Cir., 1968), 397 F2d 215, 223, cert. den., 393 U.S. 939; *Lyon* v. *United States, supra; Argo* v. *United States* (9th Cir., 1967), 378 F2d 301; and *Abel* v. *United States* (1960), 362 U.S. 217, 235-8, 80 SCt. 683, 4 LEd2d 668, 684-5. Compare *Shipley* v. *California, supra.*

[21] See *Kremen* v. *United States* (1957), 353 U.S. 346, 1 LEd2d 876, and *Von Cleef* v. *New Jersey, supra.*

[22] *United States* v. *Francolino, supra,* at 1017.

Defendants contend that the invalidity of the search of Herman's house pursuant to an invalid warrant voids their convictions. They do not assert any possessory interest in the premises nor that their personal rights to privacy were infringed.

The Supreme Court in *Alderman* v. *United States*[23] has restated the rule:

> "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing."[24]

The Court's basic reasoning was as follows:

> "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."[25]

(5) *The harmless error question.*

Thus, the final search and seizure question is whether the introduction of articles seized in the invalid search

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[23] (1969), 394 U.S. 165, 89 SCt. 961, 22 LEd2d 76, reh. den. 394 U.S. 939.

[24] *Id.* at 171-2.

[25] *Id.* at 174-5.

of Herman's home on September 9 constituted harmless error, as to him, beyond a reasonable doubt.[26]

While a good deal of evidence relevant to Herman's guilt was obtained by the September 9 search of his house, the mere fact that it was relevant does not necessarily mean that defendant's substantial rights were prejudiced. To hold otherwise,

> "would be tantamount to a rule of automatic reversal. Presumably evidence is admitted only if it is relevant to the defendant's guilt or innocence. Thus under [a standard finding reversible error wherever the error 'played any part in the jury's determination'] there is no piece of evidence that one can state with confidence did not 'contribute' to the conviction. Moreover, this test is not logically related to the protection of the defendant's legitimate interests, which are unaffected by errors which were extremely unlikely to have changed the results at trial."[27]

Thirty-one exhibits were recovered. Our examination of each leaves no doubt in our minds that, despite the many items obtained in this search, they were cumulative to other credible evidence or pertained to matters not in issue and that no leads prejudicial to Herman were obtained from them. Moreover, the other evidence in the case by itself left the jury no choice but to convict Herman.

IV. CLAIMS OF BOB and JOE DAVID.

(1) *Sufficiency of proof of conspiracy.*

Bob and Joe David were found not guilty of transaction counts 2 through 7 (Nasse cars), but guilty of transaction

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[26] *Chapman* v. *California* (1967), 386 U.S. 18; *Harrington* v. *California* (1969), 395 U.S. 250. See also Note, *Harmless Constitutional Error: a Reappraisal*, 83 Harv. L. Rev. 814 (1970).

[27] Note, *Harmless Constitutional Error: a Reappraisal*, 83 Harv. L. Rev. 814, 819 (1970).

counts 8 through 16 (Scarcelli and Lasky cars). They claim there was insufficient evidence to support their convictions of conspiracy.

There was, however, testimony that changed serial numbers on two of the Nasse cars and on the Scarcelli cars were made by the same 3/16 inch die stamp, as well as that numbers on one of the Scarcelli cars and on the Lasky cars were made by the same 1/4 inch die stamp.

Willard Lasky testified that Bob and Joe had solicited his services in disposing of automobiles in early 1963; they had told him the automobiles were "perfect", even the secret numbers were covered and there was no way to tell that the automobile was legitimate or illegitimate; one fellow had got picked up with one, but it was so perfect the authorities couldn't prove it was stolen; the certificates of title were so good you couldn't tell one from a real title printed in Springfield.

Scarcelli testified that Bob and Joe had solicited his services in late 1962 or early 1963 and had delivered cars and titles to him. Such deliveries must have occurred very soon after the car had been stolen, allowing only a short time for camouflaging.

Scarcelli testified that after FBI agents questioned him, Bob David had him come to meet Bob and Joe. Joe indicated he knew about the FBI interview and said he had a radio which could pick up FBI calls. Such a receiver was later found in the car when Joe was arrested. Steger testified that after he had ridden with agents in an FBI car, Tocco told Steger "they" had heard the radio from the FBI car. Scarcelli and Lasky testified to threats made by Bob and Joe for the apparent purpose of keeping them cooperative.

We conclude that there is sufficient evidence that Bob and Joe were members of the conspiracy.

(2) *Statement by Herman.*

Abraham testified to a statement by Herman, already referred to, that he and Bob and Joe sold cars to a dealer in Ohio. Once the memberships of Bob and Joe in the conspiracy was established, this statement was admissible against Bob and Joe. It was sales talk to interest Abraham in cooperating and thus was in furtherance of the conspiracy. In any event, the jury seems not to have given it much weight, for it found Bob and Joe not guilty of the Nasse sales.

(3) *Miranda problem.*

An agent testified that when Joe David was arrested he was given certain warnings, then shown photographs of Herman, Bob, and Lasky. He identified Herman and Bob, but denied knowing Lasky. The agent so testified after other proof showed that Joe knew Lasky. Although the defense had been given the 3500 statements of the agent no effort was immediately made to challenge the sufficiency of the warnings. The first such effort was a motion to strike, made by Herman's counsel after cross-examination of the agent was completed.

The government relies on the tardiness of the challenge.[28] We agree that the challenge was tardy and is foreclosed as a result.

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[28] See *Isaacs* v. *United States* (8th Cir., 1962), 301 F2d 706, 734, cert. den. 371 U.S. 818 (1963); *Pinkney* v. *United States* (5th Cir., 1967), 380 F2d 882, 885-6, cert. den. 390 U.S. 908 (1968); *United States* v. *Aadal* (2d Cir., 1966), 368 F2d 962, 965; and *United States* v. *Indiviglio* (2d Cir., 1965), 352 F2d 276.

V. THE TOCCO CLAIMS.

(1) *Sufficiency of evidence.*

George Steger, who lived in Illinois, testified that in the spring of 1964 he agreed to buy a 1964 Cadillac from Tocco, proprietor of the Club Domino. Tocco delivered it May 9, together with an Indiana title, and received payment. Ervin Hager, who had met Herman in 1963 and discussed the purchase of blank Indiana titles for $1,000 each with Herman and Abraham, and subsequently stolen cars for Herman and Abraham, testified that he, Tocco, and Dauber stole a 1964 Cadillac in Blue Island, Illinois. This was the car delivered by Tocco to Steger. It does not appear to have been transported in interstate commerce after the theft and was not named in any count. The incident was, however, relevant to show intent and pattern.

A short while later, Steger negotiated with Tocco to purchase a Cadillac for Mrs. Logan, Steger's secretary. Hager testified that Tocco, Dauber and Hager met in Chicago Heights. Tocco said he had a sale for another car and wanted Hager to pick it up. Hager, Dauber, and another stole a Cadillac from a dealer in Elkhart, Indiana and brought it back to Tocco's Club Domino in Illinois. Hager received a title from Herman. It was shown that the payment received by Hager came from Tocco. This car was delivered June 6 to Mrs. Logan in Illinois. The Indiana title turned over to her was made out in the name of an apparently fictitious person, and came from the same source as the Indiana titles for three Nasse cars and five Iatarola cars. Tocco later procured another stolen car for a friend of Steger. Steger was interviewed by the FBI in June, 1964. Tocco asked Steger what the

FBI had said and told him that "they" had heard the radio from the FBI car when Steger was in it, coming back from the police station in Harvey. Tocco said "they haven't got anything on anybody if you don't say anything."

Count 21 charges Tocco with the interstate transportation of the Logan car. There was proof from which the jury could find he induced Hager and Dauber to transport it. We think the proof also sufficed to show participation in the conspiracy.

(2) *3500 statements.*

Defense counsel asked for Scarcelli's grand jury testimony. The government asserted there had been no showing of particularized need. The court examined the transcript *in camera* and said he found no discrepancies.

Tocco asserts he was entitled to see the testimony himself. The rule on this subject stated for this circuit in *United States* v. *Amabile*[29] was limited to application in trials commencing after April 26, 1968. Without the benefit of *Amabile*, defendants were not entitled to the grand jury testimony.[30]

Another witness testified about matters some of which were not covered in the 3500 statements given to the defense. The prosecutor assured the court he had made a search of his files and found no additional statements. No reason was shown why this assurance should not be accepted.

Steger and Hager were important witnesses. They were not called before the grand jury and thus no grand jury

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[29] (1968), 395 F2d 47, 53.

[30] *United States* v. *Battaglia* (7th Cir., 1968), 394 F2d 304, 315.

testimony exists for possible use in impeachment. Counsel for Tocco calls our attention to second circuit decisions which have been critical of "excessive" use of hearsay in seeking indictments[31] and have at least suggested that indictments may in the future be dismissed "without a showing of prejudice to the defendant if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury." [32] Counsel does not ask dismissal here, but asks that we hold that a government witness who has been "insulated against impeachment" by not being called before the grand jury is an incompetent witness. We are not persuaded to attempt to formulate a general rule in this area, and nothing peculiar to the case before us appears to call for such holding in this instance.

(3) *"Secret" numbers.*

Hopkins, an agent of the National Automobile Theft Bureau, testified that he examined a Cadillac and found that the numbers on the door plate, the "public" frame location, and the engine block were the same; but the "secondary" number on the frame was different. Evidently the secondary number is known only to the manufacturer and persons concerned with identification of vehicles for insurance and enforcement purposes, such as Hopkins. Defense counsel inquired about the location and the court sustained an objection. The court denied a motion to strike Hopkins' testimony.

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[31] *United States* v. *Umans* (2d Cir., 1966), 368 F2d 725.

[32] *United States* v. *Arcuri* (2d Cir., 1968), 405 F2d 691, 694, affirming 282 FSupp. 347. See also *United States* v. *Borelli* (2d Cir., 1964), 336 F2d 376; *United States* v. *Catino* (2d Cir., 1968), 403 F2d 491, 496; and *United States* v. *Beltram* (2d Cir., 1968), 388 F2d 449.

Requiring an answer would have destroyed the effectiveness of a device which is useful in the public interest, and the value of an answer was speculative. In our view, the district judge did not abuse his discretion.

(4) *Use of prior consistent statements.*

Tocco argues that there were two instances of use by the government of prior statements by a government witness to corroborate trial testimony or in lieu of it. It is not clear that Tocco correctly characterizes what happened. Error, if any, was insignificant.[33]

VI. IATAROLA'S CLAIM: INSUFFICIENCY OF EVIDENCE.

Iatarola operated Rocket Service Center in Gary, Indiana, an agency for new and used automobiles, and service department. At least five automobiles involved in transaction counts passed through his hands, but he argues the evidence does not prove his guilty knowledge or his participation in the conspiracy. His testimony at trial tended to place any criminal responsibility on Philip Raschke, a government witness, who was also involved in the sales of these cars. The jury could properly believe Raschke's version.

Six Cadillacs, stolen in Illinois from February 1, 1964 to February 1, 1965 were transported to Gary, and the jury found Herman guilty of transporting each, except one stolen August 2, 1964 (count 22). Iatarola sold one of these cars to an Indiana customer and no interstate transportation resulted. Five were sold to a Missouri

[33] See, however, *United States* v. *Lewis* (7th Cir., 1969), 406 F2d 480, 492. See also *California* v. *Green*, June 23, 1970, 38 L. W. 4579.

dealer named Kelly, three on November 28, 1964 and two on March 26, 1965. The jury apparently thought one of the cars sold in March belonged to and was sold by Raschke and they found Iatarola not guilty as to it, guilty as to all others. Four of the cars as to which Iatarola was found guilty and the one he sold in Indiana were sold along with spurious Indiana titles from the same source as the titles of the Tocco car and three Nasse cars. All bore serial plates taken from other cars. Hager testified that he and Buonomo had stolen two of the cars and turned them over to Herman before they reached Iatarola.

In addition to the inferences as to knowledge and participation which may be drawn from the transactions just mentioned, there were additional facts from all of which we conclude the jury could properly find that Iatarola was guilty rather than an innocent associate of Raschke.

Hager testified that in September, 1965, he accompanied Herman on a visit to Iatarola. There had been some trouble about two hot cars and Herman had taken them home. Iatarola told Herman that if Iatarola didn't get his money back, he was going to put the finger on Herman and his partner. Herman promised that Iatarola would get his money when the cars were sold.

Iatarola testified that he knew Herman as a service customer and saw him about once a month. But telephone records showed two to ten calls a month from Herman to Iatarola. The telephoning increased around the time when Kelly discovered he had purchased stolen cars and made complaints.

Iatarola admitted that he had denied to an FBI agent that he had sold any cars to Kelly.

VII. MISCELLANEOUS OTHER CLAIMS.

(1) Each defendant claims it was an abuse of discretion to deny him severance and to deny mistrials on similar claims of prejudice by being tried with the others.

The principal complaint of several defendants arises from testimony of threats by one or the other of the Davids to hold other conspirators in line or to suppress testimony. We are satisfied, however, that there was no abuse of discretion and that each had a fair trial. The verdicts indicate a careful evaluation of the evidence by the jury, acquitting three defendants entirely and acquitting Herman, Bob, Joe, and Iatarola on certain counts where there may have been room for doubt.

(2) Various claims that additional instructions should have been given, that instructions should have been differently phrased, and other claims of error have been considered, but do not require detailed treatment. We find no merit.

The judgments are affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Friday, July 31, 1970

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. JOSEPH E. ESCHBACH, *District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 16460, 16461, 16462, 16463, 16464 vs.

GEORGE NASSE, ALBERT TOCCO, ORLAND DAVID, ROBERT DAVID, HERMAN DAVID and JOSEPH IATAROLA,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

A True Copy:
Teste:
Thomas F. Strubbe, Chief Deputy
Clerk of the United States Court of Appeals for the Seventh Circuit.
(SEAL)

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Monday, November 2, 1970

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. JAMES B. ESCHBACH, *District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 16462 vs.

ORLAND DAVID and ROBERT DAVID,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing.

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Monday, November 2, 1970

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. JOSEE E. ESCHBACH, *District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 16460 vs.

GEORGE NASSER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.